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Nos. 95-1455 & 95-1506

In The

Supreme Court of the United States

October Term, 1995

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant, and

GEORGE PRICE, *et al.*,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

STATEMENT 1

INTRODUCTION AND SUMMARY OF ARGUMENT ... 6

ARGUMENT 8

I. There Is No Legal Basis For Importing The Results Standard Of Section 2 Into Section 5 8

II. The Court Below Considered All Evidence Relevant To Section 5 Purpose And Only Rejected Evidence Relevant Solely To Section 2 27

III. The Court Below's Factual Finding That The School Board Acted Without A Discriminatory Purpose Is Not Clearly Erroneous 39

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Allen v. State Bd. of Elections, 393 U.S. 544 (1969) 14

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 40

Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) 22

Arizona v. Reno, 887 F. Supp. 318 (D.D.C. 1995) 9

Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) 29, 33, 36, 49

Beer v. United States, 425 U.S. 130 (1976) 9, 10, 13, 19, 20, 21

Blanchett v. Connecticut Gen. Ins. Corp., 419 U.S. 102 (1974) 24

Board of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978) 38

Burlington N. R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987) 14

Burton v. Sheheen, 793 F. Supp. 1329 (D.S.C. 1992) 9

Bush v. Vera, ___ U.S. ___, 116 S. Ct. 1941 (1996) .... *passim*

Chisom v. Roemer, 501 U.S. 380 (1991) 16, 18

City of Lockhart v. United States, 460 U.S. 125 (1983) 11, 13, 14, 25

City of Pleasant Grove v. United States, 479 U.S. 462 (1987) 39

TABLE OF AUTHORITIES – Continued

Page

Coastal States Marketing v. Hunt, 694 F.2d 1358 (5th Cir. 1983) 48

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 15

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 15

Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) 14

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 23

Freeman v. Pitts, 503 U.S. 467 (1992) 39

Garcia v. United States, 469 U.S. 70 (1984) 14

General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) 23

Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995) 9

Georgia v. United States, 411 U.S. 526 (1973) 13

Holder v. Hall, ___ U.S. ___, 114 S. Ct. 2581 (1994) 13, 14, 17, 19, 26

Johnson v. DeGrandy, ___ U.S. ___, 114 S. Ct. 2647 (1994) 12, 27, 34, 41

Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994) 44

League of United Latin Amer. Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) 26

Lemon v. Bossier Parish School Bd., 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967) 38

TABLE OF AUTHORITIES – Continued

Page

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991) 22

Magnolia Bar Ass'n v. Lee, 994 F.2d 1143 (5th Cir.), *cert. denied*, 510 U.S. 994 (1993) 4

Miller v. Johnson, ___ U.S. ___, 115 S. Ct. 2475 (1995) ..... *passim*

Milliken v. Bradley, 418 U.S. 717 (1974) 38

Mobile v. Bolden, 446 U.S. 55 (1980) 17, 21, 36, 38

Morris v. Gressette, 432 U.S. 491 (1977) 25

Morse v. Republican Party of Va., ___ U.S. ___, 116 S. Ct. 1186 (1996) 19

National Labor Relations Bd. v. Catholic Bishop, 440 U.S. 490 (1979) 23

New York v. United States, 874 F. Supp. 394 (D.D.C. 1994) 9, 31, 46

New York v. United States, 505 U.S. 144 (1992) 24

Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) 39

Patterson v. Shuman, 504 U.S. 753 (1992) 15

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) 24

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 24

Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) 33

Pierce v. Underwood, 487 U.S. 552 (1988) 22, 24

PPX Enter., Inc. v. Audiofidelity, 746 F.2d 120 (2d Cir. 1984) 48

TABLE OF AUTHORITIES – Continued

Page

Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) 24

Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989) 14

Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 22

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 39

Reno v. Bossier Parish School Bd., ___ U.S. ___, 116 S. Ct. 1540 (1996) 5

Rogers v. Lodge, 458 U.S. 613 (1982) 29, 34, 35

Shaw v. Hunt, ___ U.S. ___, 116 S. Ct. 1894 (1996) ..... *passim*

Shaw v. Reno, 509 U.S. 630 (1993) 4

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 25, 7

Southern Christian Leadership Conference v. Sessions, 56 F.3d 1281 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 704 (1996) 4, 5

Texas v. United States, Civ. A. No. 94-1529 (D.D.C. Apr. 24, 1995) 31, 32

Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*

United States v. Board of Comm'rs, 435 U.S. 110 (1978) 13

Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642 (1989) 42

Washington v. Davis, 426 U.S. 229 (1976) 20, 21

TABLE OF AUTHORITIES – Continued

Page

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 42

Westwego Citizens for Better Gov't v. City of Westwego, 906 F.2d 1042 (5th Cir. 1990) 5

White v. Regester, 412 U.S. 755 (1973) 20, 21, 34

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 24

STATUTES AND RULES

28 C.F.R. §§ 51.53-51.58 ..... 1, 2, 23

28 U.S.C. § 2201 ..... 24, 25

42 U.S.C. § 1971(d) 14

42 U.S.C. § 1973b(8) 13

42 U.S.C. § 1973c 9, 14, 25, 26

Fed. R. Evid. 201 5

Fed. R. Evid. 401 37

La. Rev. Stat., tit. 18 § 1363(A) 45

LEGISLATIVE MATERIALS

128 Cong. Rec. 3,841 (1982) 15

128 Cong. Rec. S6930 (daily ed. June 17, 1982) 16

128 Cong. Rec. 7,095 (1982) 15

128 Cong. Rec. 14,938 (1982) 16

H.R. Rep. No. 227, 97th Cong., 1st Sess. 33 (1981) 15, 17

TABLE OF AUTHORITIES – Continued

Page

S. Rep. No. 417, 97th Cong., 2d Sess. 12 (1982) 15, 16, 20, 21

Voting Rights Act: Hearing Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 79 (1982) 15

OTHER AUTHORITIES

A. Thernstrom, *Whose Votes Count?* (1987) 15

Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347 (1983) 15

10A Wright & Miller, *Federal Practice and Procedure* § 2759 (1983) 25

STATEMENT

1. Bossier Parish is located in northwestern Louisiana, and, according to the 1990 Census, has a voting age population that is 17.6% black, and an overall black population of 20.1%. App. 2a.[1] The Parish is governed by a 12-member Police Jury. Although no electoral district of the Police Jury has ever had a majority of black voters, two black candidates have been consistently elected since 1979 to represent a 37.9% black district, and the current incumbent, Jerome Darby, was reelected without opposition in a 26.9% black district (District 7) under the new 1991 plan. App. 85a; App. 2a; J.A. 55-60.

On April 30, 1991, all the members of the Police Jury, including the black member serving on its Reapportionment Committee, approved a plan containing two districts with substantial black populations. App. 3a. Specifically, District Four was 45.2% black, and District Seven was 43.9% black. App. 85a (¶ 59). The plan was submitted to the Justice Department on May 28, 1991, and on July 29, 1991, the Attorney General precleared it. The Police Jury submitted all materials required under the Attorney General's Section 5 guidelines and in no way misled the Department of Justice. 28 C.F.R. §§ 51.53-51.58.

Given that the School Board and the Police Jury had shared the same district boundaries until 1980, the School Board approached the Police Jury to formulate a redistricting plan. App. 4a. The Police Jury rejected this overture. App. 29a. State law expressly prohibited the School Board from changing, splitting, or consolidating the precincts established

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[1] In this brief, citations are to the Appendix ("App.") filed with the jurisdictional statement of Janet Reno, *et al.*, on March 11, 1996, including the numerous stipulations of the parties which are designated herein by reference to the paragraph number; to the Joint Appendix ("J.A.") filed on August 1, 1996; to the transcript of the hearing of the D.C. District Court on April 10 and 11, 1995 ("Tr."); to the exhibits submitted at that time by the appellee ("Plaintiff's Exh."), and the appellant, Janet Reno ("U.S. Exh."); and to the brief of appellant-intervenors ("A-I").

by the Police Jury for the Police Jury's 1991 redistricting plan. J.A. 265a-266a. It was therefore required to use those existing 1991 precincts as redistricting units for its own plan. And as the parties stipulated: "[i]t is impossible to draw, on a precinct level, a black-majority district in Bossier Parish without cutting or splitting existing precinct lines." App. 115a (¶ 152).

Subsequently, George Price, president of the local chapter of the NAACP and an appellant-intervenor in this case, submitted his own plan to the School Board that included two majority-black districts, the maximum possible number of such districts and roughly proportional (2/12) to the Parish's black population. App. 6a. The plan was drawn by William Cooper, of the American Civil Liberties Union, Testimony of W. Cooper at 1, for the exclusive purpose of "creat[ing] two majority black districts," J.A. 260, wholly without regard to precinct boundaries. The NAACP plan subordinates traditional redistricting principles, such as compactness and respect for the political boundaries of towns, the Police Jury districts and precincts. A district court in a related case said of a modified, "improved" version of the NAACP plan, that it "most nearly resembles an octopus as it stretches out to the nooks and crannies of the parish in order to collect enough black voting age population to create not one, but two, majority black districts in Bossier." J.A. 38. Although the Board's plan, like all prior redistricting plans, preserves all town lines outside of Bossier City in the Parish, the NAACP plan splits the boundaries for all three. Plaintiff's Trial Exh. 11 (second, eighth and twelfth pages of the Exhibit).[2]

In direct contravention of Louisiana law, the NAACP plan split 46 precincts, 65 times. Plaintiff's Exh. 11, pp. 1-26; App. 29a. (Some of the precincts suffered more than a single split; thus requiring that they become three or more new precincts.) Of these, 17 precincts would have had less than 20 people in them. Plaintiff's Exh. 11, pp. 1-26. The Parish's district attorney and cartographer advised the Board, at the

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[2] This exhibit has been lodged with the Court.

September 3, 1992 meeting where the NAACP plan was presented that its massive number of precinct splits violated state law, and then it was rejected as a viable redistricting alternative. App. 6a; App. 99a (¶ 102). The School Board shortly thereafter on September 17, 1992, adopted the Police Jury plan that already had been precleared. App. 7a. At the September 3, 1992 meeting, the School Board also responded to NAACP concerns by granting its request that a black be appointed to the vacant seat on the Board. App. 30a.

Although it had precleared the identical Police Jury plan in 1991, and although there was no retrogression of minority voting strength of the School Board plan precleared in the 1980's, the Justice Department objected under Section 5 to the School Board plan on August 30, 1993. The Attorney General found a discriminatory "purpose" because, although "state law prohibits" the NAACP "alternative plan" from legally being adopted, this did not "necessarily" foreclose adoption of the maximization alternative. App. 156a. (School Board "is not free to adopt a plan that unnecessarily limits the opportunity for minority voters. . . . ") (emphasis added).

The NAACP plan's subordination of basic districting principles was done solely in order to replace a plan with two districts having a black population of 44% and 47%, with a plan that had two black majority districts. Yet this creation of such "safe" black districts was wholly unnecessary to provide black voters with a "viable" opportunity to elect their preferred candidates. *There is no competent evidence of racial bloc voting in any local Bossier Parish elections*, and the "foreseeable impact" (and actual result) of the Board's plan was that two black candidates would be elected to the Board. Specifically, the Justice Department's own expert was concededly unable to find *any* racial bloc voting in *any* election for *any* Bossier Parish office, pursuant to either the "extreme case analysis [or] bivariate ecological regression analysis" endorsed by the *Gingles* plurality opinion. *Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986); J.A. at 115-21. The *only* election where racial bloc voting was found was one "exogenous" *state judicial* race (held not just in Bossier Parish), which obviously reflects different voting patterns than those

for *local representative* office. J.A. 113-15.[3] Even in this single race, the "racial polarization" led to the black candidate receiving 35.7% of the vote in a parish with a 17.6% black voting age population, a difference of 18.1%. J.A. 57.

Moreover, even absent such sophisticated evidence, the raw election results themselves demonstrate that white bloc voting, assuming it exists at all, is not sufficient to "usually" defeat black preferred candidates. *Gingles*, 478 U.S. at 49. Two different black candidates have been consistently elected in a 37.9% (and 27.9% in 1991) black Police Jury district since 1979, a black candidate defeated a white opponent in a run-off in a 25.6% district for the Bossier City Council and black aldermen have been elected in three of the Parish's towns, one of whom was elected at-large in a town (Haughton) with a 30.1% black population. J.A. 55-59. In total, of the 14 "black against white" elections held in Bossier Parish jurisdictions with black populations of between 18% and 43% before the School Board adopted its plan, black candidates who even arguably had black voter support won six, or 43%, of the elections. J.A. 55-59. Of the two School Board races analyzed, the black candidates running against a long-standing white incumbent in a 30.1% black district lost by 59 and 65 votes, respectively, and the United States expert found no statistically significant racial bloc voting in these races. J.A. 57, 59, 116-17; direct Testimony of Jeff Darby at 3; direct Testimony of Johnny Gipson at 2. Since black candidates were elected in districts and towns ranging from 25.6% to 37.9% black populations, two different School Board candidates received approximately 50% of the vote against the white incumbent in a 30.1% black district, and the one "racially polarized" exogenous election provided the black candidate with 18.1% higher vote tally than the black voting age population, it is clear, even without the concessions of the

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[3] *See, e.g., Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 704 (1996); *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1149 (5th Cir.), *cert. denied*, 510 U.S. 994 (1993).

United States voting rights expert, that a plan with two districts with black percentages in the mid-40s would provide black voters with a viable opportunity to elect black candidates of their choice. The Court need not speculate about this, however, because, as the appellant-intervenors admit, when elections *were* held under the Board's "intentionally discriminatory" plan in 1994, two black candidates were elected to the Board, one of them from a 26.7% black district.[4]

Bossier Parish successfully brought a declaratory judgment action in the three-judge District of Columbia court to obtain preclearance under Section 5. The district court rejected the appellants' argument that a Section 2 violation affords grounds for denying preclearance under Section 5.

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[4] Appellant-Intervenors concede that the elections resulted in two black candidates being placed on the School Board, but argue, relying on this Court's denial of the Motion to Supplement the Record, that such "evidence of events that occurred after the Board's decision cannot illuminate its intent at the time it made the decision." Intervenor-Appellants' Br. 6 n.2. *See Reno v. Bossier Parish School Bd.*, ___ U.S. ___, 116 S. Ct. 1540 (1996). This is an odd contention since both appellants relied heavily on 1993 elections and events (the disbanding of the new "bi-racial committee") which occurred "after the Board's decision." However that may be, the most recent elections are relevant to show the absence of any racial bloc voting or potential "results," and to refute the appellants' erroneous assertion that "the School Board adopted a plan 'which *guarantees* that blacks would remain underrepresented on the Board.' " U.S. Br. 19 (quoting App. 41a (quoting *City of Port Arthur v. United States*, 517 F. Supp. 987, 1022 (D.D.C. 1981)) (emphasis added)). Moreover, it is well established that a court may take judicial notice of any fact that is not subject to reasonable dispute and is capable of accurate and ready determination. *See, e.g.*, Fed. R. Evid. 201. Accordingly, appellate courts have routinely taken judicial notice of post-trial elections in voting rights cases given their clear relevance to the proceedings. *See, e.g., Southern Christian Leadership Conference v. Sessions*, 56 F.3d at 1288 n.13; *Westwego Citizens for Better Gov't v. City of Westwego*, 906 F.2d 1042, 1045 (5th Cir. 1990) (noting that "given the long term nature and extreme costs necessarily associated with voting rights cases, it is appropriate to take into account elections occurring subsequent to trial.") (footnote omitted).

App. 11a-12a. In two sentences of its 61-page post-trial brief, the United States (but not the intervenor-appellants) argued that, even if Section 2 is not properly before the court, the court should nevertheless consider and rule upon "*all* the evidence . . . demonstrating how clear the Section 2 violation is." U.S. Post-Trial Br. 36. The court was to engage in this inquiry because, if the court found a Section 2 violation, it could use the "School Board's . . . awareness that the proposed plan might violate Section 2" to conclude that the Board had a "discriminatory purpose in adopting the proposed plan." The district court refused to conduct "full-blown Section 2 litigation" in a Section 5 purpose case and thus refused to consider "evidence relevant *only* to the section 2 violation." App. 23a; App. 9a n.6 (emphasis added). The court then found an absence of discriminatory purpose. Although the district court discounted some of the reasons advanced by the Parish, because they were not the "real reasons," it was "satisfied" that two reasons were, in fact, "legitimate" – "guaranteed preclearance" and "the absence of precinct splits." App. 27a-28a. The dissenting opinion, although agreeing that Section 2 could not be imported into Section 5, disagreed with the lower court's discriminatory purpose analysis, for essentially the reasons outlined by appellants in this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout the 1990's redistricting cycle, the Justice Department extended and distorted its uniquely intrusive Section 5 powers to invalidate ameliorative redistricting plans, if they were chosen in preference to alternative plans that consciously subordinated traditional districting principles for the avowed purpose of maximizing the number of majority-minority districts. The Department has done this principally by finding a failure to adopt the maximizing alternative reflected a racial purpose, even though such alternatives were objectively inferior pursuant to nonracial districting principles, or by invoking Section 2 "results," which the Department interprets to require selection of the maximizing

alternative regardless of its adherence to traditional districting principles. In short, the Department has sought to convert the benchmark for measuring Section 5 "effect" – the preexisting system – into the benchmark for initially assessing Section 2 "result" – the race-conscious maximizing alternative – and found Section 5 violations for failure to adopt the maximizing alternative, either directly by holding that the failure to maximize constitutes a proscribed Section 2 "result," or indirectly by finding that such a "failure" reflects a discriminatory purpose, as supplemented by Section 2 evidence of racial bloc voting and historical discrimination.

In its racial gerrymander cases of the past two Terms, the Court has expressly rejected any such understanding of Section 5 or Section 2, and otherwise prohibited interpreting federal law to require the unconstitutional action of adopting a race-conscious maximization plan that subordinates traditional districting principles. Specifically, the Court has explicitly rejected the notion that a Section 5 "purpose" may be inferred from adopting a plan that more closely adheres to traditional districting principles than the proposed maximizing alternative and rejected the notion that Section 5 preclearance can be premised on a finding that the state's redistricting plan violates Section 2, particularly if the purported Section 2 violation is the failure to adopt a maximizing alternative. Moreover, in keeping with its decision that a Section 2 violation cannot establish Section 5 purpose, this Court has expressly held the Justice Department's "purpose" findings "insupportable," without examining any of the Section 2 evidence concerning racial bloc voting and historical discrimination that the Department urged upon it as relevant to this issue.

Notwithstanding appellants' efforts to wholly distort the opinion below, the district court here articulated and engaged in precisely the same analysis employed in those cases. The court found no proscribed purpose, which is plainly correct because all the Board did here was choose a nonretrogressive plan identical to one that had been precleared by the Justice Department a year earlier and rejected a race-conscious maximizing alternative that is demonstrably inferior with respect

to a host of traditional districting principles, primarily because it split 46 of 56 existing precincts, but also with respect to compactness and maintenance of existing municipal and district boundaries. The court also correctly concluded that, since Congress did not amend Section 5 in 1982 and since the 1982 legislative history also *uniformly* makes clear that Congress *universally* understood that Section 5 prohibits *only* purposeful or retrogressive changes, preclearance cannot be denied to a benign, nonretrogressive change regardless of any unintended Section 2 "result" on minority voters. Having so ruled, the court necessarily also rejected the Justice Department's fall-back argument that it should consider *all* Section 2 evidence, such as racial bloc voting, that is expressly designed to show that rejection of the maximizing alternative has such a "result," but inherently can say nothing about the *reason* for rejecting such alternatives. Although appellants desperately attempt to mislead the Court into believing otherwise, this was the *only* such "Section 2 evidence" rejected by the district court; it manifestly did not reject evidence that was actually probative of the Board's purpose simply because that evidence might also be relevant to a Section 2 inquiry. This is made crystal clear by the court's explicit description of "Section 2 evidence" as that "evidence relevant *only* to the section 2 inquiry" and further confirmed by every statement and citation in the opinion below.

ARGUMENT

I. There Is No Legal Basis For Importing The Results Standard Of Section 2 Into Section 5

Section 5 of the Voting Rights Act imposes a uniquely severe burden on states seeking to operate their electoral systems and enforce their laws. In a reversal of all basic principles of federalism, and all normal presumptions of civil litigation, Section 5 invalidates all otherwise proper local voting laws and practices "unless and until" the submitting jurisdiction proves that it has satisfied the substantive requirements of Section 5 to either a District of Columbia three-judge court or the Attorney

General. Section 5, however, does at least set forth with some specificity the substantive standard that covered jurisdictions must satisfy to lift this burden, and the scope of the declaratory judgments the three-judge court is authorized to issue; *i.e.*, a "declaratory judgment that such [changed voting] qualification . . . does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . . " 42 U.S.C. § 1973c. It is well-established that the "effect" prong of the Section 5 reaches only changes causing retrogression in minority voting strength from what existed under the *status quo ante*. *Beer v. United States*, 425 U.S. 130, 141 (1976).

Notwithstanding this plain and unequivocal language, appellants seek to erect yet another obstacle under Section 5 to implementing a voting change: a declaratory judgment that the change does not violate Section 2 of the Act by creating a discriminatory "result." Although the United States does not dispute that Section 5 itself proscribes only voting changes with a discriminatory purpose or retrogressive effect, they argue that the three-judge court (and the Attorney General) nevertheless has the equitable authority – indeed, duty – to enjoin changes free from such defects, but violative of Section 2, because *Beer* and Section 2's legislative history "authorize" such objections. This argument is simply lawless in the most literal sense – it seeks to have the judiciary erect a substantive prohibition on state governments that can be found nowhere in the laws passed by Congress. This Court, of course, is not free to draft its own statutes, and no amount of legislative history or administrative interpretation can so empower it. It is little wonder that the United States' argument has been rejected out of hand by every lower federal court to pass on it[5] and is irreconcilable with this Court's binding precedent.

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[5] *Arizona v. Reno*, 887 F. Supp. 318, 320-21 (D.D.C. 1995); *Georgia v. Reno*, 881 F. Supp. 7, 12 (D.D.C. 1995); *New York v. United States*, 874 F. Supp. 394, 397-98 (D.D.C. 1994); *Burton v. Sheheen*, 793 F. Supp. 1329, 1351-52 (D.S.C. 1992).

1. The short, and complete, answer to appellants' argument is that this Court, in just the past two Terms, has already squarely rejected the notion that a Section 5 objection can be premised on any grounds other than an invidious purpose or retrogressive effect. Indeed, these cases resolve the precise question here by holding that Section 5 affords no basis for objecting to a redistricting plan because it failed to create additional "safe" minority districts, unless that failure was motivated by an invidious purpose. In *Miller v. Johnson*, ___ U.S. ___, 115 S. Ct. 2475 (1995), the United States argued that race-conscious redistricting was warranted to prevent a violation of Section 5. 115 S. Ct. at 2491-92. There, as here, the alleged Section 5 violation was that a political jurisdiction with racially polarized voting and historical discrimination had failed to create a sufficient number of "reasonably" compact majority-minority districts. *Id.* In response, the *Miller* Court squarely rejected this possible Section 5 defense because "[a]meliorative changes, even if they fall short of what might be accomplished in terms of increasing minority representation, cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution." *Id.* at 2492 (quoting Days, *Section 5 and the Role of the Justice Department*, and B. Grofman & C.P. Davidson, *Controversies in Minority Voting* 56 (1992)). The "State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution,' and thus cannot provide *any* basis under § 5 for the Justice Department's objection." *Id.* at 2492 (quoting *Beer*, 425 U.S. at 141) (emphasis added). The Court rejected the Justice Department's contrary interpretation as an "insupportable" expansion of "its authority under the statute beyond what Congress intended" that raised "troubling and difficult constitutional questions." *Miller*, 115 S. Ct. at 2492-93. Accordingly, the *Miller* Court squarely held that a Section 5 objection was warranted only if a redistricting change is retrogressive or has a discriminatory purpose sufficient to violate the Constitution.

The Court reaffirmed this holding just last Term in another case remarkably similar to the instant one, *Shaw v. Hunt*, ___ U.S. ___, 116 S. Ct. 1894 (1996) ("*Shaw II*"). In that case, the district court and Justice Department argued that race-conscious redistricting was appropriate because it was necessary to avoid *both* a Section 2 and a Section 5 violation. This Court again found that the Justice Department's "maximization policy" of requiring an additional black majority district "is not properly grounded in § 5 and the Department's authority thereunder." 116 S. Ct. at 1904. "Here once again we . . . find that creating an additional majority-black district was not required under a correct reading of § 5" because the nonretrogressive redistricting plan did not violate "the purpose prong of § 5" and thus "cannot violate § 5." *Id.* at 1903.

Of particular relevance, in *Shaw II*, the "United States attempt[ed] to distinguish this case from *Miller*" by pointing to the North Carolina State "legislature's determination that it may be susceptible to a § 2 challenge" – an issue that had not been directly addressed in *Miller*. *Shaw II*, 116 S. Ct. at 1904 n.6. The Court rejected this understanding of Section 5 and *Miller* because "we doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5." *Id. Accord Bush v. Vera*, ___ U.S. ___, 116 S. Ct. 1941, 1963 (1996) (race-conscious redistricting not justified by "state['s] interest in complying with VRA § 5" because the "State went beyond what was reasonably necessary to avoid retrogression"); *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983) ("Since the new plan did not increase the degree of discrimination against blacks, it was *entitled* to § 5 preclearance.") (emphasis added).

In this case, the United States again seeks to distinguish *Miller* (although not *Shaw II*) on the ground that "*Miller* did not address the issue whether preclearance should be withheld on the basis of a Section 2 violation. . . . " U.S. Br. 43-44. But this is indistinguishable from the argument – squarely rejected in *Shaw* – that a Section 2 "results" violation could justify finding a Section 5 violation. Moreover, even if the Court had not already specifically rejected this particular variation on the United States' consistent "maximization"

theme, it certainly has squarely held that there is not "*any* basis under § 5 for [an] . . . objection" except discriminatory purpose or retrogressive effect. *Miller*, 115 S. Ct. at 2492. *See Shaw II*, 116 S. Ct. at 1904 (voting change "*cannot violate* § 5 unless [there is discriminatory purpose]") (quoting *Miller*, 115 at 2492).

Moreover, the United States defines a "§ 2 violation," as a situation "where racially-polarized voting deprives minority voters of an equal opportunity to elect their chosen candidates, and it is possible to create 'more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of their choice.' " U.S. Br. 44 (quoting *Johnson v. De Grandy*, ___ U.S. ___, 114 S. Ct. 2647, 2655 (1994)). The United States boldly asserts that "*Miller* did not hold that preclearance must be granted in the face of [such a § 2 violation]." *Id.* But, of course, *Miller* did precisely and unequivocally hold that "§ 5 cannot be violated" simply by showing that a racially polarized political jurisdiction did not "create" a "possible" majority-minority district: "In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the Statute beyond what Congress intended and we have upheld." 115 S. Ct. at 2493. To be sure, in *Miller*, as here, the United States specific argument was that the failure to maximize constituted discriminatory purpose, rather than a § 2 discriminatory result. *See* Department of Justice Letter of Aug. 30, 1993, App. 154a, App. 156a-157a. Nevertheless, *Miller* rejected any such maximization policy as "far removed" from any proper (and constitutional) understanding of Section 5. *Id.* at 2493. If it is an unjustified distortion of Section 5 to interpret its *language* as requiring maximization, it is obviously an even greater distortion to require such maximization by importing Section 2 into Section 5, without any basis for doing so in the statutory text. And, as noted, *Shaw II* rejected any such misinterpretation of *Miller's* holding. *See also Shaw II*, 116 S. Ct. at 1904 ("Failure to maximize cannot be the measure of § 2.") (quoting *Johnson*, 114 S. Ct. at 2660).

But even assuming that the lower court's understanding of Section 5's scope is not mandated by "*stare decisis*, especially in such sensitive political contexts as the present," *Vera*, 116 S. Ct. at 1964, it is, as we presently show, certainly required by any rational principle of statutory construction.

2. When Section 2 was amended in 1982 to incorporate the "results" standard, the life of Section 5 was also extended for another 25 years. 42 U.S.C. § 1973b(8). Other than this extension, however, neither the substantive language nor any other provision of Section 5 was amended in any way. As noted, it was well established in 1982, pursuant to this Court's 1976 decision in *Beer*, that Section 5 "effects" reached only changes which caused a retrogression of minority voting strength. *Beer v. United States*, 425 U.S. at 141 ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."); *City of Lockhart v. United States*, 460 U.S. at 134 (quoting *Beer*). As the United States correctly notes, it is a well-established canon of statutory construction, particularly for the Voting Rights Act, that congressional reenactment of a statute without change incorporates this Court's prior interpretations of the statute. *United States v. Board of Comm'rs*, 435 U.S. 110, 134 (1978); *Georgia v. United States*, 411 U.S. 526, 533 (1973) ("After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5.")

Moreover, since 1982 this Court has repeatedly recognized that the substantive scope of Section 5 and Section 2 are markedly different, because Section 5 has a much more "limited substantive goal." *Bush v. Vera*, 116 S. Ct. at 1963. *See Holder v. Hall*, ___ U.S. ___, 114 S. Ct. 2581, 2587 (1994) ("[T]he two sections differ in structure, purpose and application."); *Miller*, 115 S. Ct. at 2493 (Section 5's goal is " 'freezing election procedures in the covered areas unless the changes can be shown to be non-discriminatory.' ") (quoting *Beer v. United States*, 425 U.S. at 140). Specifically, the

Court has consistently ruled that "effect" means only "retrogression."[6] Accordingly, it is even clearer now than it was in 1982 that the effect prong of Section 5 invalidates only new voting changes that "increase the degree of discrimination against blacks [or other minorities]." *City of Lockhart*, 460 U.S. at 134. Plainly it does not reach changes that simply fail to *improve* minority voting strength or otherwise embody the "results" standard of Section 2.

Moreover, no language in Section 5 cross-references Section 2, no language anywhere in the Voting Rights Act incorporates Section 2 into Section 5 or otherwise implies that Section 2's substantive standards govern Section 5 determinations. Nor are Section 5 courts granted jurisdiction to address Section 2 challenges. To the contrary, the authority and jurisdiction of the three-judge court in the District of Columbia is strictly limited to issuing a declaratory judgment on whether the voting change has a discriminatory purpose or retrogressive effect. 42 U.S.C. § 1973c.[7] Conversely, the three-judge district court simply has no subject matter jurisdiction over Section 2 claims; that jurisdiction is vested exclusively in the typical "district courts of the United States." 42 U.S.C. § 1971(d). Accordingly, *regardless* of what the legislative history contains, there is no basis for distorting or amending the "plain meaning" of the language enacted into law.[8]

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[6] *Miller*, 115 S. Ct. at 2493; *Shaw II*, 116 S. Ct. at 1904; *Shaw v. Reno*, 509 U.S. 630, 654 (1993). *See also Holder*, 114 S. Ct. at 2587 (opinion of Kennedy, J.) (benchmark for measuring § 5 effect, but not § 2 result, is the "existing voting practice"); *id.* at 2589 (O'Connor, J., concurring) (same); *City of Lockhart*, 460 U.S. at 134 (The aim of "Section 5 was to prohibit only retrogressive changes.").

[7] *City of Lockhart*, 460 U.S. at 129 n.3. (Under Section 5, the issues to be decided by a three-judge court are strictly limited.); *Allen v. State Bd. of Elections*, 393 U.S. 544, 561-62 (1969).

[8] "Legislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989). *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 172 (1989); *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 119 (1980); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *Patterson v. Shuman*, 504 U.S. 753, 760 (1992).

We nevertheless note that the legislative history *uniformly* reflects a universal understanding that the language of Section 5 prohibits only changes with a discriminatory purpose or retrogressive effect. First, every expression of congressional intent confirms that Congress understood that it was simply "extend[ing] the *present* coverage" of Section 5. S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982) ("S. Rep.") (emphasis added). *See id.* at 7 ("Congress has decided to retain Section 5."). *See also* H.R. Rep. No. 227, 97th Cong., 1st Sess. 1 (objective of 1982 Act is "to extend continuously [Section 5]") (1981) ("House Rep."). Indeed, as the commentators have noted, not one witness at the Senate or House Subcommittee Hearings in 1982 discussed changing Section 5 or otherwise suggested that changes to Section 5's preclearance standard were needed.[9] Even the two representatives who *desired* that a Section 5 objection be premised on a Section 2 violation clearly stated their understanding that the "effect" prong of Section 5 reached only "retrogression" and that it differed from Section 2 "results."[10] The legislative history otherwise confirms congressional awareness of the

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[9] *See* A. Thernstrom, *Whose Votes Count?* 300-01 n.10 (1987); Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1420-21 n.365 (1983). *Voting Rights Act: Hearings Before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 79-80 (1982).

[10] Senator Kennedy: "As mentioned in this report, *the section 2 standard is not the same as the section 5 standard.* This means not only that section 2 is governed by the totality of the circumstances factors, but it also means that the retrogression requirement of *Beer* against United States does not apply to section 2 cases – although of course, such a retrogression would be relevant evidence in section 2 case." 128 Cong. Rec. 7,095 (1982) (emphasis added). 128 Cong. Rec. 3,841 (statement of Representative Sensenbrenner) (same).

obvious differences between the Section 2 "results" standard and the Section 5 "effects" standard.[11]

Thus, even assuming a statute can be amended while its language remains wholly unaltered, Congress' deliberate and conscious preservation of an existing preclearance process that unequivocally did not reach nonretrogressive discriminatory results is irreconcilable with the conclusion that the 1982 Amendments were intended to inject such a results standard into the Section 5 preclearance process. This truism was made explicit in colloquies between one of the principal sponsors of the Act, Representative Edwards, and two of his colleagues, after the Senate Report had been written.[12] Accordingly, under any theory of statutory interpretation, there is no basis for interpreting Section 5 to reach Section 2 results.[13]

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[11] 2 Senate Hearings 80 (Sen. Dole) ("The Section 5 effects test is different from the results test of *White v. Regester*."); S. Rep. at 68; 128 Cong. Rec. S6930-31 (daily ed. June 17, 1982) (remarks of Sen. DeConcini); 1 Senate Hearings 89 (Attorney General Smith); 1 Senate Hearings 671 (Sen. Hatch); 1 Senate Hearings 1689 (W. B. Reynolds).

[12] Mr. LEVITAS. . . . I . . . inquire of the gentlemen from California whether there is *any portion of this legislation that changes section 5 of the act, of the Voting Rights Act, or changes the tests contained therein. Does it or does it not affect section 5?*

Mr. EDWARDS of California. If the gentleman will yield, I believe the gentleman is referring to pre-clearance, section 5.

Mr. LEVITAS. That is right.

Mr. EDWARDS of California. *No change was made.*

Mr. FOWLER. . . . *[I]s it true that the proposed amendments sent over by the other body [Senate] do not change in any way section 4 of the current Voting Rights Act?*

Mr. EDWARDS of California. *That is correct; the preclearance provisions are not changed.*

128 Cong. Rec. 14,938 (1982) (emphasis in original).

[13] *See Chisom v. Roemer*, 501 U.S. 380, 396 (1991) ("[W]e are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have

Incredibly, neither appellant takes issue with *any* of the foregoing. Neither appellant seriously argues that the effects (or purpose) prong of Section 5 can be interpreted to prohibit (benign) nonretrogressive changes. They do not seek to have this Court overturn its consistent holdings, before and after 1982, that "effect" means only "retrogression." They do not and cannot cite any legislative history or any administrative interpretations suggesting that Section 5's "effect" or "purpose" invalidate an "ameliorative" change because of a proscribed Section 2 "result."[14]

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identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment."); *Holder*, 114 S. Ct. at 2629 (Stevens, J. dissenting) ("When a statute has been authoritatively, repeatedly, and consistently construed for more than a quarter century, and when Congress has reenacted and extended the statute several times with full awareness of that construction, judges have an especially clear obligation to obey settled law.").

[14] According to the United States, a statement in the House Committee Report articulating the rationale for *amending Section 2* to remove the "purpose" requirement, indicates that a Section 2 violation should result in the denial of preclearance under Section 5. U.S. Br. 38 (quoting House Rep.). Even when taken out of context, however, that passage does not say anything about Section 5, about Section 5 courts or about those courts' ability to entertain Section 2 claims. Of course, if the passage *did* say that Congress was amending Section 2 to make its prohibitions coextensive with Section 5, then Section 2 would prohibit only "retrogression." We doubt the United States would accept this result, even though they elsewhere insist that it would be "anomalous" for Section 5 and Section 2 to have different standards. When restored to its context, the quoted passage simply advances the primary rationale for why Congress should overturn *Mobile v. Bolden*, 446 U.S. 55 (1980) and adopt a non-"purpose" standard for Section 2, as the immediately following paragraphs make clear. *See, e.g.*, House Rep. at 29 ("applying a 'purpose' standard under Section 2 while applying a 'purpose or effect' standard under the other sections of the Act would frustrate the basic policies of the Act."). But this does not suggest that the non-"intent" standard adopted for Section 2 would be identical to the Section 5 "effect" standard and, much more important, there is absolutely no suggestion that Congress was modifying in any way the Section 5 "effect" standard to track Section 2. In this regard,

Rather, they make the astonishing argument that a change can be denied preclearance under Section 5 *even if it satisfies Section 5*. In support of this *non sequitur*, they point to legislative history and administrative interpretations which, they claim, "authorize" Section 5 objections for actions which Section 5 does not prohibit, but Section 2 does. While we deal with the specifics of those arguments below, the dispositive, and seemingly obvious, point is that a court cannot object under Section 5 unless it can interpret *Section 5* to prohibit the proposed voting change.

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the most that can be gleaned from the House Report is that Congress thought that there would be gap in the Voting Rights Act's protections if Section 5 imposed a *more difficult* legal standard on states that Section 2 imposes. If that were the case, then discriminatory voting procedures would be illegal only if they were changed and triggered Section 5 coverage, but precisely the same practices would be immune from Section 5 or Section 2 challenge if they were "either [unchanged since] 1965 or because they arise in jurisdictions not covered by Section 5." *Id.* at 28. *Cf. Chisom v. Roemer*, 501 U.S. at 401. But there is no such gap if Section 5 imposes a *less onerous* standard than Section 2, because voting procedures which satisfy Section 5 can nonetheless be challenged under the generally applicable Section 2. Finally, as this Court has already carefully described, the House Report was describing a predecessor version of the Section 2 law rather than that ultimately enacted, which contained only a subsection (a) simply "provid[ing] that proof of discriminatory intent is no longer necessary." *Chisom*, 501 U.S. at 395. It was only in the Senate, after "Senator Robert Dole's compromise," that a subsection (b) was added to "provide guidance about how the results test is to be applied." *Id.* at 399 n.26, 395. As Senator Dole made clear, "an added benefit of the compromise is that it makes clear that the *White* approach should apply by directly codifying language from that decision in Section 2," which helped because the "House report . . . was ambiguous as to whether to the *White* test or the Section 5 effects test should apply." 2 Senate Hearings 80. Again, while there may have been ambiguity about how closely the new Section 2 results test would follow the existing Section 5 effects standard, no one suggested that the Section 5 standard was being modified or expanded to encompass Section 2 results. As noted, this point was made explicit by the Edwards-Levitas colloquy when the Senate Bill, with the new subsection (b), was returned to the House.

If no federal law invalidates Bossier Parish's redistricting system, there is simply no bar to enforcing this ordinance and holding elections under it. And if the three-judge court finds that the redistricting plan is free from invidious purpose and retrogression, the preemptive constraints of Section 5 have been lifted and no federal law trumps the Board's plan. If the three-judge court decides to also issue an advisory opinion on Section 2, this can be of no legal consequence because nothing in the Voting Rights Act makes such a Section 2 determination a prerequisite to implementing a jurisdiction's voting changes and, in any event, the three-judge court has no subject matter jurisdiction to rule on any Section 2 violation. Accordingly, even if every Member of Congress clearly said they *wanted* the three-judge court to deny preclearance to laws that satisfied Section 5's substantive precepts, there is simply no law which would provide the court with the authority to do so and, indeed, any such action would be entirely contrary to the statutory language Congress did enact.[15]

3. According to the Solicitor General, a Congress which engaged in one of its most extensive and divisive debates over whether Section 2 should be amended to incorporate the ambiguous "results" test, nonetheless "intended" to broadly expand the substantive scope of Section 5 beyond the "retrogression" standard in *Beer* by incorporating the controversial "results" standard into the Section 5 preclearance process. Congress manifested this "intent," albeit unaccompanied by any statutory amendment *implementing* that intent, in two ways.

First, Congress conveyed its understanding that *Beer*, of all cases, had *already* "authorized" Section 5 objections for

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[15] Two Justices in *Morse v. Republican Party of Va.*, ___ U.S. ___, 116 S. Ct. 1186, 1201 (1996) (Opinion of Stevens, J.) opined that any voting "practices and procedures [that] fall within the scope of § 2, . . . must also be subject to Section 5." Of course, the question of whether "for threshold coverage, §§ 2 and 5 have parallel scope" is an entirely separate issue from whether the substantive legality of those procedures need be adjudged by the same standards. *Holder*, 114 S. Ct. at 2589 (O'Connor, J., concurring).

violations of the *White v. Regester*, 412 U.S. 755 (1973), "results standard" embodied in Section 2. *See* U.S. Br. 37-38. *Beer* purportedly authorized Section 5 "results" objections in the following sentence: "[A]n *ameliorative* new legislative apportionment *cannot violate § 5* unless the new apportionment itself so discriminates on the basis of race or color as to violate the *Constitution*." *Beer*, 425 U.S. at 141 (emphasis added). Perhaps realizing that this sentence did not clearly convey that ameliorative redistricting plans were *impermissible* if they had a negative "*result*," Justice Stewart eliminated any ambiguity by citing *White v. Regester* at the end of a string cite in a footnote explaining, in *dicta*, why the plaintiffs "could [not] rationally" argue that a Louisiana redistricting plan's failure to create compact black-majority districts "remotely approach[ed]" establishing a constitutional violation. *Id.* at 142 n.14. One sentence in a 1982 Senate Report footnote stated that *Beer* held that an ameliorative change "is *not* objectionable" unless the "change 'itself so discriminates *on the basis of race* or color as to violate the *Constitution*,' " thus somehow suggesting that Section 5 authorized a "results" objection under *Beer*. S. Rep. 12 n.31 (1982) (quoting *Beer*, 425 U.S. at 141) (emphasis added).

This is not a remotely plausible interpretation of *Beer* or the sentence citing it in the Senate Report footnote. *Beer*'s explicit holding and rationale was that Section 5 "effect" reached only retrogressive changes and therefore did not, contrary to the holding of the lower court and the reasoning of Justice Marshall's vigorous dissent, reach *White v. Regester* results. *See Beer*, 425 U.S. at 157-63 (Marshall, J., dissenting). The sentence in *Beer* cited by the United States does not reverse that holding, but simply makes the obvious point that intentionally discriminatory action is prohibited by Section 5. Actions taken "*on the basis of race*" are purposefully discriminatory and the Constitution only forbids purposeful discrimination. *Washington v. Davis*, 426 U.S. 229, 239-41 (1976). Moreover, the *Beer* court stated that such unconstitutional discrimination would "violate *§ 5*." *Id.* at 141 (emphasis

added). And, after *Beer* established the retrogression standard, the only way an ameliorative voting change could violate Section 5 would be if it was motivated by the discriminatory "purpose" outlawed by that statute.

More to the point, even if Justice Stewart (the author of *Bolden)* was confused about whether the Constitution reached unintentional discrimination in 1976, Congress well understood in 1982 that the Constitution embraced the purpose standard in voting cases and elsewhere. The whole point of amending Section 2 was, of course, to establish a statutory "results" test that was different from the "exceedingly difficult" and "subjective" purpose standard that *Washington v. Davis* and *Bolden* had established for the Constitution. *See Thornburg v. Gingles*, 478 U.S. at 35, 71-74; S. Rep. at 28. Thus, in 1982, it was impossible to have understood *Beer*'s reference to the constitutional standard, or the Senate Report's quotation of that reference, as denoting anything other than the purpose test enunciated in *Bolden* and *Davis*, which differed so markedly from the *White v. Regester* "results" showing. Even if this were at all ambiguous, the *Senate Report itself* states as clearly as possible that Congress was *deliberately differentiating* the *White* "results" standard of Section 2 from the Section 5 "effects" standard.[16] Thus, *no one* thought that "purpose" meant "results"; no one thought "effect" meant anything other than retrogression and no one thought *Beer* held that "purpose" or "effect" meant "results."

To be sure, the Committee staffers who authored the Senate Report then went on to express their desire that the Attorney General (and perhaps three-judge Section 5 courts) object not only to laws which violate the substantive scope of Section 5, but "also" to those that "violate Section 2." S. Rep. at 12 n.31. But the relevant point is that neither this sentence, nor any other in the legislative history, purports to suggest

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[16] "By referring to the 'results' of a challenged practice and by explicitly codifying the *White* standard, the amendment distinguishes the standard for proving a violation under Section 2 from the standard for determining whether a proposed change has a discriminatory 'effect' under Section 5 of the Act." S. Rep. at 68.

that *Section 5* outlawed the "results" proscribed by Section 2. To the contrary, if Section 5's substantive requirements did mirror those of Section 2, then there could be no such thing as a change which satisfied Section 5 but nonetheless violated Section 2. That being so, the desires expressed in the Senate Report concerning how Section 5 was to be enforced are meaningless – it is neither law nor even legislative history. "[U]nenacted approvals, beliefs, and desires are not laws." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988). As in *Isla Petroleum*, "[t]here is no text here . . . to which expressions of . . . intent in legislative history might attach." *Id.* at 501.[17] The only purpose of legislative history is to illuminate the meaning of ambiguous statutory language, and the Senate Report does not purport to relate to any statutory language, even assuming there was some ambiguity in Section 5.

For essentially the same reason, the fact that the Justice Department has issued administrative guidelines saying the Attorney General will enter a Section 5 objection when "necessary to prevent a clear violation of amended section 2" is of no consequence. 28 C.F.R. § 51.55(b)(2). Assuming *arguendo* that the Attorney General's interpretation of the Voting Rights Act is entitled to any deference in these circumstances,[18] the

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[17] Even if the Senate Report did purport to interpret the meaning of Section 5, it could not affect the construction of that provision because Section 5's language was not changed in 1982. In *Pierce v. Underwood*, 487 U.S. 552, 567 (1988), this Court held that a Committee Report setting forth a very definite view of a 1980 civil rights attorneys' fee statute, at the time the statute was reenacted in 1985 without change to its language, was irrelevant to interpreting the statute's meaning because, "[q]uite obviously, reenacting precisely the same language would be a strange way to make a change."

[18] As the district court correctly noted, such deference is not appropriate given that an action seeking preclearance may be brought in court in the first instance. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 203 (1991). Furthermore, the Department's guidelines are just that and are not entitled to the deference afforded regulations. *See, e.g., General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 n.6 (1986) (noting that administrative "guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law."). More important, as in *Miller*, deference should not be accorded the Department's interpretation given the serious constitutional concerns it raises. 115 S. Ct. at 2491 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988)). *See also National Labor Relations Bd. v. Catholic Bishop*, 440 U.S. 490 (1979). Not only is the Equal Protection Clause implicated by the Department's maximization policy, but also this expansion of Section 5 would cause serious concerns under the Tenth Amendment and federalism principles given the additional burdens on States. *Miller*, 115 S. Ct. at 2493.

relevant guidelines do not purport to "interpret" anything in the Voting Rights Act or Section 5. Rather, in stark contrast to the argument the Justice Department advances in this Court, its guidelines clearly state that a "change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group. . . . " 28 C.F.R. § 51.54(a). Thus, the Justice Department concedes that effect encompasses only retrogression, but not Section 2's "result." The guidelines then go on to simply announce that even if a change satisfies Section 5, the Department will withhold preclearance if the change clearly violates Section 2. 28 C.F.R. § 51.55(b)(2). Thus, the guidelines nowhere contend that Section 5 reaches changes with discriminatory results, but quite candidly acknowledge that they must rely on Section 2 to invalidate such nonretrogressive changes. Since the Court will not defer to an agency interpretation of *unambiguous* statutory language, it obviously cannot defer to agency policies that concededly rest on no statutory language.[19] *See*

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[19] Perhaps the United States' silliest argument is that this Court should give weight to the fact that a House Subcommittee in *1987* "endorsed" an Attorney General's Guideline that resembled the Justice Department's current guideline on the interaction of Section 2 and Section 5. U.S. Br. 40-41. The fact that a handful of Representatives from a different Congress, who were not amending the Voting Rights Act, viewed favorably an Executive Branch enforcement policy says nothing about

Presley v. Etowah County Comm'n, 502 U.S. 491, 509 (1992) (refusing deference to the Attorney General because Section 5 "unambiguous[ly]" does not cover changes to decisionmaking authority).

Moreover, it is a cardinal "rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). *See New York v. United States*, 505 U.S. 144, 171 (1992); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). The United States' attempt to increase Section 5's burden on the states emphatically flunks this stringent test since there is no "language of the statute" suggesting that Section 2 is incorporated into Section 5, much less unmistakably clear language to this effect.[20]

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congressional intent five years earlier. *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 132 (1974); *Pierce*, 487 U.S. at 566 ("[I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.") If we are wrong in this, however, we respectfully submit that the Court is obliged to solicit the views of the *current* House Subcommittee on Civil and Constitutional Rights, who are entitled to similar deference and might well have a very different view of the Justice Department's Section 2 and "maximization" policies.

[20] Abandoning any pretense that their argument is supported by any federal law, the United States makes the shocking suggestion that, *even if the Voting Rights Act does not authorize any such objection*, Section 5 courts may, in the exercise of their "equitable discretion," enjoin state law practices merely because they offend the Court's view of the "public interest." U.S. Br. 34-35. While district courts exercising the equitable authority granted by 28 U.S.C. § 2201 obviously "may," pursuant to virtually unreviewable "discretion," *refuse to adjudicate* declaratory judgment actions brought before them, this plainly has no application to the duties of courts exercising the extraordinary and unique powers under *Section 5*. As the correlative responsibility of the Attorney General reflects,

We note finally that the appellants determined twisting of Section 5 is wholly unnecessary to protect any voting rights of minorities guaranteed by the 1982 Voting Rights Act. Obviously, if any jurisdiction violates any Section 2 rights, much less commits a "clear" violation, the Justice Department and private intervenors can promptly bring a Section 2 lawsuit to swiftly end any such deprivation.[21] Here, the Board's

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Section 5 courts are not *permitted* to issue a declaratory judgment under Section *2201*, they *must* "expeditious[ly]," *Morris v. Gressette*, 432 U.S. 491, 504 (1977), issue such a declaratory judgment under the duties imposed by *42 U.S.C. 1973c*, because submitting jurisdictions are "*entitled* to preclearance," *Lockhart*, 460 U.S. at 134, to relieve the *temporary* "suspen[sion of] new voting regulations pending scrutiny by federal authorities," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), *unless* the court finds that the change has the prescribed "purpose or effect." *Cf.* 42 U.S.C. § 1973c (Attorney General has 60 days to object). If the Section 5 courts truly did enjoy the discretion granted by § 2201, they could permissibly refuse to relieve Section 5's preemption of state laws for virtually any reason, including "inconvenience," even if the changes plainly did not violate either Section 5 *or* Section 2. 10A Wright & Miller, *Federal Practice and Procedure* § 2759. Needless to say, this would be blatantly unconstitutional. *South Carolina v. Katzenbach*, 383 U.S. at 335-36. But even if the specious analogy to Section 2201 is accepted, the United States argument is still unavailing because § 2201 only authorizes district courts to *refrain from resolving* the potential controversy and thus maintaining the *status quo* where the presumptively valid state law remains in effect. It obviously does not empower district courts to *issue* a declaratory judgment that the state law satisfies the federal commands with which it allegedly conflicts, but then nonetheless enjoin the state law because it allegedly offends another law over which the court has no jurisdiction, in order to serve the "public interest." Yet the Justice Department seeks just such an expansion of Section 5 courts' substantive powers (and necessarily, then, its *own* power) by arguing that a court may declare compliance with Section 5's purpose and effect, but then enjoin the practice due to a perceived Section 2 violation, all in the name of the Court's inherent "discretion" to vindicate the public interest.

[21] In this regard, the United States suggests that it would be "anomalous" if courts resolving Section 5 questions could not also adjudicate Section 2 disputes. But any such "anomaly" is, of course,

redistricting plan plainly did *not* violate Section 2 because there was no "reasonable alternative" benchmark plan that was either "compact" or did not subordinate traditional districting principles. *Holder*, 114 S. Ct. at 2589 (O'Connor, J., concurring); *Gingles*, 478 U.S. at 50. More important, as shown above (*infra* p. 3-5), appellants would be utterly unable to prove any racial bloc voting by white or black citizens in *local* Bossier Parish elections and the *one* "exogenous" *state judicial* race (held not just in Bossier Parish), where racial bloc voting was found, obviously cannot show that whites "usually" defeat black-preferred candidates. *Gingles*, 478 U.S. at 51. Thus, the Justice Department could never have mounted a successful Section 2 suit, particularly since the Fifth Circuit uses a more stringent test for bloc voting than the *Gingles* plurality, which is precisely why the Department has never challenged the Police Jury plan *identical* to the "intentionally discriminatory" School Board plan that so "clearly" violates Section 2. *See, e.g., League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831,

inherent in the fact that, as this Court has repeatedly confirmed, the two statutes have different substantive standards. (*See infra* p. 13) The entities covered by Section 2 and Section 5 are different, the burdens of proof are different, the benchmarks for measuring racial impact are necessarily different, the courts which adjudicate such disputes are different, the triggering mechanisms ("change") for coverage are different, and most important, Section 5 imposes unique burdens on sovereign state governments. Therefore, it would be quite "anomalous" indeed if Section 5 did *not* have a more "limited substantive goal" than the generally applicable Section 2. *Vera*, 116 S. Ct. at 1963. Moreover, it is only by *accepting* appellants' argument that this Court would authorize "relitigation" and potentially conflicting judgments. *See* U.S. Br. 24. If a Section 5 court were, after a full trial, to affirmatively find *no* Section 2 violation and grant preclearance, the jurisdiction would have no *res judicata* defense to a subsequent Section 2 suit because Section 5 clearly states that neither the Attorney General's preclearance "nor a declaratory judgment entered under this section shall bar subsequent action to enjoin enforcement of [the voting change]." 42 U.S.C. § 1973c.

850-55 (5th Cir. 1993) (requiring consideration of *nonracial causes* of racial bloc voting).[22]

II. The Court Below Considered All Evidence Relevant To Section 5 Purpose And Only Rejected Evidence Relevant Solely To Section 2

The district court opinion clearly states, "[b]ecause we hold . . . that section 2 of the Voting Rights Act . . . has no place in this section 5 action, much of the evidence relevant *only* to the section 2 inquiry is not discussed in this opinion." App. 9a n.6 (emphasis added). So far as we can discern, appellants do not maintain that this constituted legal error if Section 2 was not properly before the court below. Neither appellant argues in this Court that *all* evidence relevant to establishing a Section 2 "results" violation is relevant to the Section 5 purpose inquiry, nor do they advance the *non*

[22] Appellant's Procrustean attempt to force Section 2 litigation into the Section 5 proceeding is also wholly unworkable because of the two statutes' differing evidentiary burdens. And even if this Court were inclined to rewrite Section 5's plain requirements and place the Section 2 burden on the United States, this would merely complicate the submitting jurisdiction's task because they would have to *await* the United States' discovery and presentation of complex evidence concerning racial bloc voting, and all the voluminous "Senate Report factors" before it could "rebut" this enormous evidentiary showing. *See Gingles*, 478 U.S. at 44-45 (listing "nonexclusive" Senate Report factors and "stress[ing]" that "other factors may also be relevant."). Moreover, the three-judge court "must" examine *all* such "evidence in the totality of circumstances," because Section 2 violations were "intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Johnson*, 114 S. Ct. at 2657. Consequently, the extraordinary confusion and delay engendered by injecting Section 2 issues into Section 5 cases would, as a practical matter, preclude any jurisdiction from seeking preclearance from the Section 5 courts, since timely resolution is essential under Section 5, particularly in the redistricting context. This is, of course, the Justice Department's intended result, since it would then become the sole practicable gateway for all Section 5 submissions and would have to "prove" a Section 2 violation only to *itself*.

sequitur that the court should have considered that subset of Section 2 evidence that is "irrelevant" to Section 5 purpose.

Consequently, in order to manufacture a "legal error" in this straightforward "clearly erroneous" case, appellants distort beyond recognition the legal principle actually announced by the district court and devote the bulk of their briefs to attacking the straw man thus created. Specifically, they argue that *some* evidence is relevant to both Section 2 and Section 5 violations and that the court below excluded probative Section 5 purpose evidence solely because it was also relevant to establishing a Section 2 violation. Appellants provide two examples of evidence which was allegedly so excluded: the racial impact of the Bossier Parish's redistricting plan and the official history of racial discrimination in Louisiana.

While we certainly agree that courts – in Section 5 proceedings or elsewhere – should not exclude evidence probative of the legal question being resolved simply because it is also relevant to another legal issue, the district court did not in word or deed so exclude any such evidence probative of the Section 5 purpose inquiry because it also shed light on the Section 2 question. Any suggestion that the court did reject evidence relevant to *both* Section 2 and Section 5 is, of course, irreconcilable with the court's plain statement that it was not considering "evidence relevant *only* to the Section 2 inquiry." App. 9a n.6 (emphasis added). Moreover, in applying this standard, the court did consider the impact of the Board's redistricting plan and, indeed, devoted most of its opinion to explaining why that alleged impact did not reflect the racially discriminatory purpose. To be sure, the court below did not yet again recite the familiar litany of the Louisiana state legislature's shameful prior discrimination against black voters, for the very good reason that this history sheds absolutely no light on the Bossier Parish School Board's purpose in adopting its redistricting plan. Indeed, the court below's method of analyzing the Section 5 discriminatory purpose issue mirrors precisely the analysis employed by this Court to resolve the same issue in *Miller* and *Shaw II*.

1. In *Miller*, as here, the Justice Department strenuously argued that its Section 5 "purpose" objection to the

initial Georgia redistricting plan was well-founded because there was a "history of discrimination in voting" continuing "into the 1980's," as well as substantial "racial bloc voting" and the fact that "black candidates had in the past virtually never been successful." Brief of United States filed in *Miller v. Johnson*, at 32-33. As here, the Justice Department argued that such evidence was probative under *Rogers v. Lodge*, 458 U.S. 613 (1982) and the *Arlington Heights* factors for "racial impact" and the "historical background of the decision." *Id. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977). As noted, without any reference or inquiry into these factors, the Court found the Justice Department had "no reasonable basis" to infer a discriminatory purpose. *Miller*, 115 S. Ct. 2492. Rather, the Court found no such purpose solely on the grounds that the district court had "accepted" the Attorney General's "detailed explanation [that] the initial decision not to enact the max-black plan" was due to its "policy of adhering to other districting principles." *Id.* Similarly, in *Shaw II*, the Court found the Justice Department's "purpose" argument "insupportable" because North Carolina initially rejected the "second minority district" in order "*to keep precincts whole*, to avoid dividing counties into more than two districts . . . " and other neutral redistricting principles. 116 S. Ct. at 1904 (emphasis added). Again, in reaching this determination, the Court viewed as irrelevant North Carolina's well-documented history of racial discrimination and racially polarized voting. *See, e.g., Gingles*, 478 U.S. at 38, 59.

Thus, in both cases, this Court resolved the Section 5 purpose inquiry solely by determining whether there were legitimate and credible reasons for rejecting the plan with the additional minority district and eschewed as irrelevant the Section 2 evidence concerning prior voting discrimination and racial bloc voting. As noted, the *Shaw II* opinion also explicitly expressed its disagreement with the notion "that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5." 116 S. Ct. at 1904 n.6. Since this is precisely the analysis articulated and followed by the district court (albeit in far greater detail),

it is impossible to conclude that it erroneously excluded probative Section 5 evidence.[23]

2. Apparently recognizing this, appellants seek to mischaracterize the district court opinion as holding that otherwise probative evidence of discriminatory purpose somehow becomes incompetent because it also is relevant to Section 2. The district court said no such thing, as is made particularly clear by analyzing the argument that the Justice Department *actually* advanced below.

As part of its ongoing effort to have Section 5 courts convert their analysis of the purpose of a voting change into a full-blown Section 2 trial of the underlying system being changed, the United States argued that, even if Section 2 is not properly an issue before the Court, the Court should nevertheless consider and rule upon "*all* the evidence . . . demonstrating how clear the Section 2 violation is." U.S. Post-Trial Br. 36. *See infra* note 5. The Court was supposed to engage in this seemingly pointless inquiry because, if the Court found a Section 2 violation, it could use the "School Board's . . . awareness that the proposed plan might violate Section 2" to conclude that the Board had a "discriminatory purpose in adopting the proposed plan." *Id.* It also identified

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[23] In a truly pathetic attempt to suggest that the district court did not follow *Miller*'s analysis, and that *Miller* considered Section 2 "results" evidence, the Solicitor General maintains that *Miller* did consider such results because "the Court considered the [redistricting] plan's ameliorative impact." U.S. Br. 22 (citing 115 S. Ct. at 2492). To be sure, the *Miller* Court, like the court below, did point out that the initial Georgia redistricting "plans were 'ameliorative' and could not have violated § 5's non-retrogression principle." *Miller*, 115 S. Ct. at 2492. App. 10a ("And, all parties agree that the School Board's proposed redistricting will not have a retrogressive effect."). Both courts then considered whether the choice of the redistricting plan with a greater adverse impact (less "safe" black seats) reflected a discriminatory purpose. Neither court, however, examined the Section 2 results evidence concerning racial bloc voting or prior historical discrimination that the Justice Department urged upon both courts.

one subset of Section 2 evidence – "the history of discrimination in Bossier Parish, especially discrimination affecting the right to vote" – as "independently relevant to the purpose issue." *Id.* Thus, the Justice Department drew a clear distinction between that subset of Section 2 evidence that was "independently relevant" on its own terms to Section 5 purpose and the other "Section 2 evidence" that should be considered to resolve whether there was a Section 2 violation.

The court below quite properly rejected the Justice Department's effort "to do indirectly what it cannot do directly" by refusing to conduct "full-blown section 2 litigation" on an issue not properly before it. App. 23a (quoting *New York v. U.S.*, 874 F. Supp. at 399). This in no way implies the very different proposition that the court rejected evidence that is "independently relevant" to the Section 5 purpose inquiry simply because it might also be relevant to a Section 2 violation. As noted, the court's explicit characterization of "section 2 evidence" as "evidence relevant *only* to a Section 2 violation" eliminates any potential ambiguity on this point. Moreover, *every* statement by the district court further demonstrates that it was rejecting only the Justice Department's back-door effort to introduce all Section 2 evidence by equating the Section 2 violation with discriminatory purpose, but was not making the indefensible ruling that otherwise material evidence of purpose somehow should be excluded because it was also relevant to Section 2.[24] Appellants can

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[24] The court stated that it would not resolve "alleged section 2 *violations*" even if advanced by appellants "under the guise of 'purpose' evidence." App. 23a. (emphasis added). It did *not* say it refused to consider legitimate evidence of Section 5 purpose because it also might be relevant to establishing a Section 2 violation. Quoting *Miller*, *Texas*, and *New York*, it noted that resolving whether a "voting-procedure change[ ] . . . " was motivated by a discriminatory purpose is a much narrower and different inquiry than "full-blown section 2 litigation" challenging "the existence of an allegedly discriminatory system." App. 23a. In light of these "differing standards," the court, like this Court in *Shaw*, would not permit inapposite "section 2 evidence to prove discriminatory purpose under Section 5." App. 23a-24a.

point to nothing in the opinion which suggests the district court's exclusion of the "section 2 evidence" urged upon it by the U.S. was accompanied by an additional, *sub silentio* exclusion of evidence relating to *both* "section 2" and Section 5.[25] Thus, like the Section 5 courts in the *New York* and *Texas* cases, the court below simply rejected the United States' facially implausible argument that the existence of a Section 2 violation in the underlying system, or the submitting jurisdiction's "awareness of" that potential violation, somehow established discriminatory purpose in their choice of competing redistricting plans; thus requiring consideration of "all" Section 2 evidence. Indeed, appellants now concede that *Miller*, *New York* and *Texas* did not purport to exclude relevant purpose evidence because it might come under the rubric of Section 2 proof. U.S. Br. 21; A-I Br. 24. They therefore cannot explain how the court below's direct quotation of these holdings somehow was intended to adopt a different rule.

3. Moreover, the district court's consideration of the evidence before it plainly shows it discussed all probative evidence and did not erect some prophylactic ban against evidence potentially relevant in a Section 2 case. Appellants repeatedly maintain that the "court specifically refused to consider the discriminatory effect of the challenged redistricting plan on minority voters" because of its purportedly reflexive aversion to anything that looked like Section 2 evidence. U.S. Br. 17; *see* A-I Br. 24. Appellants cannot cite any passage in the district court containing this "specific refusal," however, because it is wholly a figment of their imaginations.

To the contrary, the district court quite clearly, thoroughly and directly considered the adopted redistricting

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[25] The district court twice used the phrase, "section 2 evidence" without explaining again that this referred to evidence "relevant only" to the Section 2 violation. But the court had already provided this explanation and, even when ripped from its context, the phrase "section 2 evidence" does not connote evidence relevant to *both* Section 2 and Section 5. Moreover, as noted, this discussion was in a context where the Justice Department had drawn a clear distinction between "section 2 evidence" and evidence "independently relevant" to Section 5 purpose.

plan's effect on minority voters. Indeed, it devoted virtually all of the relevant part of the opinion to resolving precisely this question. To be sure, the court did not engage in the ritualistic formula of independently listing "impact" as a "important starting point" for analysis under *Arlington Heights*. Rather, like *Miller*, *Shaw II*, and virtually all other discriminatory purpose opinions, the court cut directly to the dispositive question "started" by the existence of impact: did the Board have "legitimate, nondiscriminatory motives" for adopting its plan over the maximization plan offered by the NAACP, *i.e.*, a plan with less adverse impact. App. 27a n.14. It would, of course, have been irrational and meaningless to compare the relative merits of the NAACP plan and the Board's plan unless the court was considering the alleged negative impact of the Board's plan (as compared to the NAACP plan) in resolving whether it was adopted "because of" that impact. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) ("Discriminatory purpose . . . implies that a decisionmaker" selected a course of action " 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."). The court assumed that fewer safe black districts negatively affected black voters' electoral opportunities, but found that such an impact was not violative of Section 5 because the failure to create such safe districts was done "in spite of" that impact. *Id.* Thus, the court below engaged in precisely the sort of inquiry this Court has used to resolve all questions of discriminatory purpose, in the voting rights context and elsewhere.

To be sure, in assessing whether the racial impact was justified because it was free of invidious purpose, the court below did simply *assume* that fewer "safe" black seats negatively affected black voters. Accordingly, like *Miller* and *Shaw II*, the court did not trudge through the *antecedent* evidence of racial bloc voting, the depressed socio-economic status of blacks in the Parish, Louisiana's familiar history of racial discrimination, or any of the similar Section 2 evidence appellants urged upon it. But all such evidence is relevant only to the question of whether the Board's redistricting plan had an adverse impact or "result," which the district court

assumed it did, and says nothing about the Board's purpose in choosing that plan.

As the *Gingles* preconditions reflect, the probative value of racial bloc voting and minority electoral success is to "prove that the challenged electoral mechanism [an at-large plan or single-member plan with majority white districts] impairs the [minorities'] ability 'to elect.' " *Gingles*, 478 U.S. at 48-49 n.15. Similarly, the primary relevance of "historical discrimination" is to show that such state action contributed to "restrict[ing] the present opportunity of blacks effectively to participate in the political process." *Rogers v. Lodge*, 458 U.S. at 625. *See Gingles*, 478 U.S. at 69 ("Voting Rights Act [is intended] to eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination.").[26] Accordingly, such evidence is designed to show that, in light of "past and present reality," the electoral processes are not "equally open" to minority voters, and thus seemingly neutral devices, such as at-large systems, actually have a negative impact on minority voters. *Rogers*, 458 U.S. at 622 (quoting *White v. Regester*, 412 U.S. at 769-70). Moreover, in keeping with the avowed purpose of amending Section 2 to replace the subjective "intent" inquiry with the objective "results" analysis, virtually all other Section 2 evidence is also intended to show that a "certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters. . . . " *Gingles*, 478 U.S. at 47. *See id.* at 44-45 (listing Senate Report factors). However, if a community is free of racial bloc voting and historical suppression of minorities, "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having *no need* to be a majority within a single district." *Johnson*, 114 S. Ct. at 2661 (emphasis added). Put simply, then, the Section 2 evidence tells us *why* a black majority district is *needed* to elect black candidates, but it

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[26] *See also Rogers*, 458 U.S. at 624-26.

says nothing about *why* a black majority district was *not created*.

The district court was thus properly indifferent to whether this Section 2 evidence might show that Bossier Parish was an electoral community where white majority districts actually had the "result" of diluting minority voting strength, since it presumed that white majority districts had such an effect in resolving the only relevant purpose question. Consequently, the evidence establishing that white majority districts had a negative impact was utterly superfluous or, more accurately, could only *harm* appellants' case by opening up the question of negative impact that the court was prepared to presume existed.

For this reason, the fact that *Rogers* found evidence of racial bloc voting and socio-economic disparities attributable to historical discrimination "relevant" in constitutional challenges to existing at-large systems plainly does not suggest that the courts must analyze such evidence in a Section 5 purpose case. In *Rogers*, in order to meet their burden, plaintiffs needed to *establish* both that the at-large system prevented electoral success and that it had been "maintained for the purpose of denying blacks equal opportunity to the political process in the county." 458 U.S. at 627. Accordingly, the presence of racially polarized voting, depressed black turnout, as well as the causative effect historical discrimination played in such phenomena, was not only "relevant," but *essential* to establishing state-sanctioned minority vote dilution. Such evidence was necessary to show that the facially neutral at-large system had the foreseeable impact of perpetuating and exacerbating "the lingering effects of past discrimination," a *prerequisite* to finding discriminatory purpose. *Id.* at 626.

In a Section 5 case, however, there is no need to consider this antecedent evidence establishing the foreseeable negative impact of majority white districts if the Court *presumes* such foreseeable negative impact, in determining whether such impact was the government's purpose. In a typical constitutional challenge brought against a political jurisdiction such as the *Rogers* case, *plaintiffs* must *establish* that the existing

electoral conditions render facially neutral, majoritarian electoral systems dilutive of minority voting strength, as a prerequisite to establishing that dilution was the government's deliberate purpose. In a Section 5 case where the submitting jurisdiction has the burden, it is assumed, due to the racial polarization and prior discrimination that renders the jurisdiction subject to Section 5 preclearance, that such racially-charged electoral conditions exist and white majority districts will thus have a foreseeable impact. Thus, courts proceed directly to the only relevant question of whether such impact is motivated by a discriminatory purpose. Consequently, the district court was entirely correct that evidence concerning current electoral conditions, and prior historical discrimination, was superfluous (unless, of course, the submitting jurisdiction put impact at issue by arguing that white majority districts would have no negative impact because voting is race-blind and minorities had overcome prior discrimination). Thus, we cannot understand how the *appellants* can complain that the district court relieved them of the obligation to establish the *Gingles* preconditions and the ongoing effects of prior official discrimination.

2. This is not to say, of course, that a "series of official actions taken for invidious purposes" by the particular governmental actor is irrelevant to the question whether this specific voting change was motivated by the same invidious purposes. *Arlington Heights*, 429 U.S. at 267. Such "prior bad acts" evidence is generally relevant to show that the decision at issue was part of an intentionally discriminatory pattern. However, none of the "historical discrimination" canvassed by appellants or the dissenting opinion, and eschewed by the district court, is remotely related to, or demonstrative of, prior discrimination by the School Board in this case. Rather, it is simply the familiar recitation of reprehensible actions by the Louisiana state legislature "dating back to the Civil War," which are wholly unrelated to any action specifically undertaken by Bossier Parish, much less the current School Board. U.S. Br. 4-5; A-I Br. 7. Even in a typical case, such "past discrimination cannot, in the manner of original sin, condemn government action that is not itself unlawful." *Mobile*, 446

U.S. at 74. This is particularly true where, as here, the condemned action is performed by "unrelated government officials" such as the state legislature. *Id.* at 74 n.20.

Moreover, the irrelevance of such historical discrimination is particularly obvious in the Section 5 context. All covered jurisdictions, particularly Southern jurisdictions, share the same sorry racial history and that, of course, is why they are subject to Section 5's extraordinary requirements in the first place. *See South Carolina v. Katzenbach*, 383 U.S. at 310-13. More particularly, this history is the reason that these governments are stripped of the normally strong presumption of legitimacy and forced to carry the burden of disproving discriminatory purpose. To add to that already onerous burden by also using that history as a basis for finding a particular governmental unit's discrete decision discriminatory, even when supported by credible nonracial reasons that would be credited if undertaken by Northern jurisdiction, is indeed impermissible "double counting." App. 24a n.12. The fact that the Bossier Parish School Board, like all other Section 5 jurisdictions, is situated in a State with a discriminatory history which the Board is not responsible for and cannot change, simply does not make it "more probable" that it selected a redistricting plan for discriminatory purposes. Fed. R. Evid. 401. This Court therefore properly ignored the existence of such evidence in Georgia and North Carolina when it resolved the discrete Section 5 purpose issue in *Miller* and *Shaw*.

We are left, then, with one species of evidence that appellants maintain does reflect on *this* School Board's discriminatory *animus*: the fact that Louisiana schools were *de jure* segregated and the Bossier Parish school system has not yet been declared unitary. A-I Br. 7-8; U.S. Br. 5-6. Appellants maintain that this is directly probative evidence of the Board's racist actions and that the district court ignored such evidence of "responsiveness" and "historical discrimination" pursuant to its generalized exclusion of all evidence touching on Section 2. Appellants are manifestly wrong on both counts. First, the district court did independently consider the School Board's desegregation activities. App. 34a n.18. While the

court, quite properly, peremptorily dismissed such evidence as reflecting any racial *animus* here, the relevant point is that it did *consider* such evidence. It would not have done so had it already, as appellants erroneously maintain, categorically excluded all probative purpose evidence because such evidence was also relevant to the Section 2 "results" test. On the merits, the fact that the Parish's schools are not perfectly racially balanced due to demographic changes and that an advisory desegregation committee lapsed into disuse 20 years ago is clearly not, as the district court properly found, "in any way related to the School Board's purpose in adopting the Police Jury plan."[27] App. 34a n.18. *Cf. Bolden*, 446 U.S. at

[27] The initial biracial committee last met twenty years ago in 1976, when perhaps one current Board member was serving. This committee was established pursuant to a *consent* decree and was charged with "recommend[ing] to the School Board ways to attain and maintain a unitary system and to improve education. . . . " App. 103a (¶ 111). This plainly implies that it was intended merely to ease the transition to a unitary system, not serve as a permanent governmental bureaucracy. Given this limited role, it is entirely understandable that the interest of the volunteer citizens who served on the committee waned over time. There is nothing in the record suggesting that the Department of Justice, the other *Lemon* plaintiffs or the black community ever complained about its dormancy. The appellants' attempt to draw a discriminatory inference from the establishment and disbandment of a newly constituted biracial committee is equally misguided. In fact, the School Board demonstrated its responsiveness to the black community by *voluntarily* establishing this committee in 1993 at the request of the NAACP. App. 104a (¶ 113). As the district court found, the committee was dismissed when it exceeded its advisory role in achieving a unitary system and instead began to involve itself in matters relating to educational, rather than desegregation, policy. As the Court has often recognized, such policy "is committed to the control of state and local authorities." *See, e.g., Board of Curators of the Univ. of Missouri v. Horowitz*, 435 U.S. 78, 91 (1978); *Milliken v. Bradley* , 418 U.S. 717, 741-742 (1974). Nor is there any evidence suggesting that any of the School Board's attendance lines violate the court's orders. Therefore, the racial imbalance in five schools complained of by the appellants is necessarily attributable to demographic factors over which the School Board has no control and against which it has no duty to countervail. *See*

73-74 (Even *purposeful* discrimination against blacks in employment and public services by the *current* defendant government is "relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system. . . . "). While the Justice Department was apparently intent on litigating their ongoing desegregation case with the Parish, as well as the Section 2 case, in this Section 5 proceeding, the district court's discounting of such desegregation evidence was proper, and certainly not "clearly erroneous."

In sum, the Justice Department has unsuccessfully mounted a sustained campaign to have Section 5 courts strike down legitimate changes to underlying electoral systems on the grounds that the underlying electoral system is racially polarized and has a discriminatory lineage. Since the submitting jurisdictions are not responsible for private citizens' voting patterns or for prior historical discrimination, and since neither those patterns nor that history would be altered *regardless* of which voting change is selected, this evidence is clearly irrelevant to the focused inquiry on *why* the submitting jurisdiction chose the nonretrogressive plan it did.

III. The Court Below's Factual Finding That The School Board Acted Without A Discriminatory Purpose Is Not Clearly Erroneous

Findings of fact, particularly those relating to motive or intent, may "not be set aside unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).[28] Given

Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (holding that a district court is "not entitled to require [a school board] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity"); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

[28] *See id.* at 288 ("[Findings] as to the design, motive and intent with which men act are peculiarly factual issues for the trier of fact" (quoting *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949)); *City of*

that the district court's factual findings are amply supported by the record, there is no plausible basis for characterizing its findings as clearly erroneous.

Indeed, once again, there is "no reasonable basis" for appellants' argument that the Board selected the Policy Jury plan in preference to the NAACP alternative because of a discriminatory purpose. *Miller*, 115 S. Ct. at 2492. The Board was offered a choice between two alternative redistricting plans. As the undisputed facts establish, one plan had been precleared by the Justice Department, supported by the black member of the Police Jury's Reapportionment Committee, enhanced minority voting strength and clearly complied with state law and traditional districting principles, such as compactness and maintaining the integrity of municipal, district and precinct boundaries. J.A. 47; J.A. 42. The other alternative concededly constituted a facial violation of state law which the School Board was without power to change, required more than doubling the number of existing precincts, split every municipal boundary in the Parish, grossly departed from the Police Jury districts and created black majority districts that were plainly not compact under any normal definition of that term. J.A. 48-49; plaintiff's Exh. 11. It was further conceded that the sole, not only "predominant," reason for so "subordinat[ing] [traditional] districting principles" was to racially discriminate in favor of black voters. J.A. 260; *Shaw II*, 116 S. Ct. at 1901 (quoting *Miller*, 115 S. Ct. at 2488).

Indeed, so far as we can discern, this case is unique in the annals of discriminatory purpose jurisprudence in that the minority proponents cannot offer a *single nonracial* reason for adopting the minority-enhancing alternative. Appellants cannot cite *one* traditional districting principle in which the

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Pleasant Grove v. United States, 479 U.S. 462, 469 (1987) (holding that under Section 5, "findings, both as to the purpose [of adopting a voting change] and with respect to the weight of evidence regarding the purpose of the [changes] at issue, are findings of fact that we must accept unless clearly erroneous"). *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

proposed NAACP alternative is superior to the Police Jury plan. Conversely, in several key respects – compliance with political boundaries, maintaining precincts, compactness, compliance with state law – the NAACP maximization alternative is both obviously inferior to the Police Jury plan and, in fact, materially indistinguishable in purpose and effect from the racial gerrymanders this Court has repeatedly struck down as unconstitutional. Indeed, the deficiencies in the NAACP alternative are so apparent that even appellants abandoned it as a viable plan at trial, seeking to substitute the *post hoc* alternative "Cooper" plans (which nevertheless retained all of the deficiencies outlined above).

Moreover, there is no assertion or showing that the Police Jury plan in any way "packs" or "fragments" any concentration of minority voters or otherwise "split (or lumped) minority neighborhoods that would have been grouped into a single district (or spread among several) if the [Board] had employed the same line-drawing standards in minority neighborhoods as it used elsewhere in the jurisdiction." *Johnson*, 114 S. Ct. at 2659. To the contrary, as is demonstrated by the fact that the Police Jury plan was precleared after careful scrutiny by the Justice Department, the plan kept intact any reasonable concentration of minority voters that was feasible under neutral principles and state law. In a Parish with a 20.1% black population, this resulted in the creation of two districts with 45% and 43.7% black populations, respectively, and four districts with black populations of between 21 and 29%. J.A. 47. It merely did not seek, as the NAACP plan concededly did, to unite through a conscious gerrymander widely dispersed black concentrations that never would have been united were their racial composition different.

As even this brief review demonstrates, appellants' real complaint is not that the Board subordinated neutral principles in order to discriminate against minority voters, but that they failed to subordinate such principles in order to discriminate in favor of minority voters. The Justice Department candidly said as much to the district court, when it explicitly argued that if "the Bossier Parish School Board declined to take race into account [to prefer minorities this] would indeed

violate Section 5." App. 24a n.12. As in *Miller* and *Shaw II*, then, the Justice Department expressly equates a failure to maximize with a discriminatory purpose, at least absent some absolutely compelling reason that *necessarily* forecloses maximization. *See, e.g.*, DOJ Objection Letter, App. 156a (School Board "is not free to adopt a plan that *unnecessarily* limits the opportunity for minority voters to elect their candidates of choice.") (emphasis added).

The Court should again reject the Justice Department's attempt to equate racial discrimination with the failure to engage in racially preferential treatment for minorities. Most fundamentally, this is because the assertion that race-blind actions constitute intentional racial discrimination is a classic oxymoron. Somewhat less directly, but no less significantly, basing a "purpose" finding on the failure to engage in race-based redistricting creates an inexorable hydraulic pressure on governments to adopt an unconstitutional racial gerrymander that subordinates traditional districting principles. *Cf. Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 993 (1988); *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 653 (1989). As this Court has noted, local governments must be given leeway to reconcile the potential tension between the "results" demands of Section 2 with the Constitution's command to avoid race-conscious redistricting that subordinates neutral principles. *Vera*, 116 S. Ct. at 1961; *id.* at 1969 (O'Connor, J., concurring). If this Court were now to require district courts, notwithstanding Rule 52, to infer discriminatory purpose when the government simply rejects a concededly race-conscious gerrymander that violates state law and traditional principles, it will have destroyed that leeway by forcing governments to engage in such gerrymanders. This would be particularly ill-advised because, even assuming there is some inevitable potential tension between Section 2 and the Equal Protection Clause, there is obviously no such tension between the "purpose" requirement of Section 5 and the "purpose" requirement of the Fourteenth Amendment: both are plainly satisfied by racial neutrality towards all groups. Indeed, this Court has already held that such a "race-neutral" plan is the only constitutionally permissible

remedy for violating Section 5's purpose requirement. *Shaw II*, 116 S. Ct. at 1904 n.6 ("Even if discriminatory purpose could be shown, the means of avoiding such a violation could be race-neutral, and so we also doubt that the prospect of violating the purpose prong of § 5 could justify a race-based redistricting plan. . . . "). Since race neutrality is the touchstone of any liability or remedy, it is virtually, if not theoretically, impossible that a redistricting plan which more directly adheres to neutral redistricting standards than the maximizing alternative reflects racial animus, and it is quite impossible to hold a contrary finding "clearly erroneous." As we now show, the plan selected by Bossier Parish was just such a redistricting plan, which cannot be found to violate Section 5 without both redefining discriminatory "purpose" and compelling the adoption of an unconstitutional racial gerrymander.

1. The short, and dispositive, explanation for why the Board had a completely legitimate, nondiscriminatory reason for rejecting the proposed NAACP alternative is that this alternative (or even any variant thereof)[29] facially violated a state law that the Board was powerless to evade. The Board was required to use the precincts created by the Police Jury (and used by the Police Jury for its districts) as the "building blocks" for the Board's districts. Louisiana law is quite unequivocal on this point: "[t]he boundaries of any election district for a new apportionment plan from which members of a school board are elected shall contain whole precincts established by the parish governing authority [i.e., the Police Jury]. . . . " J.A. 265-66. The failure to abide by this

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[29] Given that the Cooper plans were not even formulated until after the School Board had adopted its plan, they are clearly irrelevant to this proceeding. In any event, these plans clearly subordinate traditional redistricting principles to racial considerations. Even the "best" of these plans splits all but one of the Parish's towns, results in 31 precinct splits and is not compact. J.A. 51. *See* Plaintiff's Exh. 10 (lodged with the Court).

mandatory requirement renders the School Board's redistricting plan "null and void."[30] J.A. 266.

The Police Jury established 56 precincts for this decade in 1991, which the School Board was thus obliged to use to build its own districts. The district lines in the NAACP plan, however, cut 46 of those precincts, some of them more than once, for a total of 65 different precinct splits. App. 29a; Plaintiff's Exh. 11. The appellants seek to portray this as a mere inconvenience. To the contrary, these 65 separate violations of state law rendered the NAACP plan a nullity and did indeed "legally preclude the Board from considering the plan." U.S. Br. 9.

Appellants maintain that *another* entity, the Police Jury, could have helped the School Board evade this state law. What they mean by this is that the School Board would have been in technical compliance with the requirement that their precincts be coextensive with the Police Jury's, if the Police Jury had voluntarily decided to create 65 additional precincts to track the School Board's precincts under the NAACP plan. What appellants cannot provide is any rational, *nonracial* reason why the Police Jury (or the Board) would ever engage in such a bizarre, costly and confusing exercise.

Every objective reason strongly counseled against more than doubling the existing number of precincts in this poor rural parish. This Court has already vividly described the "electoral nightmare" and "multiplied" costs caused by racially-motivated line drawings which required Harris County, Texas to almost double its existing precincts and "thrust voters into new and unfamiliar precinct alignments, a few with populations as low as 20 voters." *Vera*, 116 S. Ct. at 1959. *See Shaw II*, 116 S. Ct. at 1904 (traditional districting principles furthered by "keep[ing] precincts whole"); *Johnson v. Miller*, 864 F. Supp. 1354, 1367, 1376 (S.D. Ga. 1994) (criticizing precinct

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[30] In an attempt to confuse this issue, appellants state that the Police Jury had modified the precincts used in the 1980's when it adopted its 1991 redistricting plan. This is quite true, but entirely beside the point. No state law prohibits the Police Jury from changing its prior precincts to reflect population shifts and conform with its new districts, but once it has done so, the Board must use those precincts to build its districts.

splits). The situation in Bossier Parish was even worse than that envisioned for Texas and Harris County. The number of precincts would have increased *115%*, from 56 to 121, and 17 of those 65 new precincts would have had less than 20 people in them. Plaintiff's Exh. 11, pp. 1-26. In addition to producing the problems noted in *Vera*, the cost of each new precinct was approximately $850 or, in the aggregate, $55,250, for *every* state, federal and local election.[31] J.A. 171. Finally, but perhaps most important, "cutting across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of political identity, and thus intensifies the emphasis on race." *Vera*, 116 S. Ct. at 1962.

On a subjective level, of course, the Police Jury (and the Board) never would have believed that such massive, racially-motivated addition of precincts was necessary to secure the Justice Department's Section 5 approval since the Department had just precleared the Police Jury's districts and precincts a year before. Moreover, as the district court noted, the Police Jury had previously "rebuffed the School Board's earlier overtures" for "joint redistricting," and, after the Justice Department objected to the Board's plan, "[o]nce the idea of redistricting the police jury districts was presented, the Police Jury dismissed it real quickly." App. 29a; App. 91a, (¶ 79). After the Justice Department's objection, it is hardly surprising that the Police Jury wanted to maintain the *status quo* since a massive alteration of precinct boundaries, predicated on the need to depart from intentionally discriminatory Police Jury district lines, would have been a damaging admission of the Police Jury's *own* liability. The School Board therefore had every objective and subjective reason not to quixotically request that the Police Jury conspire with it to wreak costly

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[31] Appellants suggest that such costs could have been potentially reduced through joint polling places for a number of precincts. This would have saved little, however, because the law expressly requires that *each* precinct have at least one voting machine, even if it is in a shared polling place (in order to be able to accurately tally the votes cast in each precinct). La. Rev. Stat., tit. 18 § 1363(A).

havoc on the electoral system, and the Police Jury had every such reason to refuse.

Though appellants must concede that there is no legitimate, nonracial reason for destroying the existing precinct system, they apparently claim that such reasons were *post hoc* pretexts invented by the Board.[32] But the undisputed facts establish that the *contemporaneous* explanation for rejecting the NAACP alternative was that the district attorney and the Board's cartographer both correctly informed the Board that the NAACP's massive precinct splitting was a facial violation of state law. App. 6a; App. 99a (¶ 102). Moreover, although the Police Jury and School Board used different *district* lines for the first time in the 1980's, they had *never* split precinct lines and there is no evidence that any of the redistricting plans submitted for the Board's consideration by its cartographer created such splits. The United States says that precinct splitting in Louisiana is "quite common," but this is a deliberate distortion of the record. While, as the stipulation cited by the Justice Department reflects, differing *district* lines may be "common," appellants' own witness was able to cite only 3 such examples, and all of those apparently were done to

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[32] They further argue that the district court did not *believe* this pretextual explanation, but erroneously found an absence of discriminatory purpose because the Board "could have" not wanted to destroy precincts. U.S. Br. 30; App. 38. This is plainly untrue. The Court's opinion noted that the *contemporaneous* explanation for rejecting the NAACP plan was the precinct splits. App. 6a. It further noted that the School Board had "offered a host of non-discriminatory reasons for adopting the Police Jury plan." App. 27a. It rejected some offered explanations because they were not "the real reasons," but was "satisfied that at least two of these are 'legitimate' " – "guaranteed preclearance" and "no precinct lines would need redrawing." App. 27a-28a (quoting *New York*, 874 F. Supp. at 400). This plainly demonstrates that the Court was clearly accepting only the "real reasons" motivating the Board at the time of the decision, not manufacturing or crediting untrue *post hoc* rationalizations. When the opinion later said, after canvassing the merits of avoiding precinct splits, that the Board "entirely reasonably could have" desired no precinct splits, it was obviously concluding that the Board's subjective motivation was also objectively credible and important. App. 29a.

accommodate Justice Department objections. J.A. 240; J.A. 137-138. None remotely approached the massive 65 precinct splits of the NAACP plan; the greatest number of splits in other jurisdictions was eight. J.A. 238. Even assuming practices in *other* parishes somehow undermines Bossier Parish's longstanding, uniform practice of preserving Police Jury precincts, the fact that a handful of other parishes buckled to the Justice Department's demands to split a *few* precincts hardly casts doubt on the legitimacy of the Board's adherence to state law or its refusal to engage in futile, costly and irrational efforts to have the Police Jury help it evade this important requirement.

Since it is impossible to create a black majority district without splitting a very significant number of precincts, and since there was neither any rational reason to, nor reasonable hope of, evading the state law prohibition against such precinct splits, this reason alone sufficed for the Board to reject the plan and for the district court to find no purpose. App. 115a (¶ 152); J.A. 167. We nevertheless note that the Police Jury plan had a host of other legitimate nondiscriminatory advantages over the NAACP's proposed racial gerrymandering. In the past two Terms, the Court has accepted adherence to each such traditional redistricting principle as a refutation of any discriminatory purpose finding and found departures from each such principle sufficient to condemn racial gerrymanders.

First, the NAACP's proposed lines were at war with every other political boundary in the Parish. Most obviously, while the School Board plan tracked precisely the Police Jury's districts, the maximization alternative used completely different district lines. Plaintiff's Exh. 11 (first page). Such complete divergence between district lines greatly compounded the "voter confusion" caused by the precinct splits because it prevented "[communities] [from] shar[ing] . . . representatives" with common interests. *Vera*, 116 S. Ct. at 1959; *see Shaw II*, 116 S. Ct. at 1904 (a legitimate nondiscriminatory principle is to "avoid dividing counties into more than two districts."). Similarly, while the Police Jury plan and all prior redistricting plans scrupulously maintained the integrity of municipal

boundaries within the Parish, the maximizing alternative exhibited "utter disregard of city limits" by splitting *all* three towns in the Parish. *Vera*, 116 S. Ct. 1959; *Miller*, 115 S. Ct. at 2484. A black majority district in the northern part of the Parish was not possible unless these small towns were split "in order to capture pockets of [black] residents" living within municipal limits. *Vera*, 116 S. Ct. at 1959.

With respect to compactness, while the School Board's northern district (District 4) is a square, regularly shaped district, the NAACP creates two long, narrow jagged districts (Districts 2 and 12) that are "somewhat hooked-shaped . . . with finger-like extensions" that "wind in a snake-like fashion . . . until it gobbles in enough enclaves of black neighborhoods." *Shaw II*, 116 S. Ct. at 1899; *Vera*, 116 S. Ct. at 1954-55. Similarly, in Bossier City, the NAACP's black-majority and adjacent districts (Districts 1 and 6) are even skinnier, more distended and less compact than the northern districts.[33] This is in contrast, again, to the School Board's

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[33] Appellants cite to a stipulation that purports to demonstrate the compactness of their proposals for the black-majority district in Bossier City. App. 1, ¶ 36. This stipulation, however, has no bearing on and makes no reference to the plans proposed by the appellants. Instead, when placed in context, it suggests that it was obvious, apparently to some unnamed members of the Police Jury in 1991, that one "reasonably compact" majority-black district could be established within Bossier City. This *subjective* assessment of some of the Police Jurors has no reference to the *objective* feasibility of creating a "reasonably compact" black-majority district in Bossier City. Furthermore, even if the Court were inclined to adopt a broad construction of the stipulation at issue, the facts relating to the stipulation were contested at trial. The parties introduced substantial evidence reflecting on the feasibility of creating a "reasonably compact" majority-black district in Bossier City. *See, e.g.*, Plaintiff's Exh. 11; J.A. 48-49, J.A. 51-52, J.A. 260-61. Thus, the stipulation should be disregarded. *PPX Enter., Inc. v. Audiofidelity*, 746 F.2d 120, 123 (2d Cir. 1984) (a court is entitled to disregard a stipulated fact where "substantial" evidence is presented to contradict such stipulation); *Coastal States Marketing v. Hunt*, 694 F.2d 1358, 1369 (5th Cir. 1983) (asserting that a court has "not only the right but the duty" to relieve a party from a pretrial stipulation where "substantial evidence" is presented to contradict the stipulation).

districts that are quite compact, especially given population concentrations, the bordering river and Parish boundaries. The Plan's departures from compactness are inherently required to create both black majority districts. This is evidenced by the fact that the best version of any such plan, ("Cooper I") was condemned by a federal district court, "as resembl[ing] an octopus, as it stretches out to the nooks and crannies of the parish in order to collect enough black voting age population to create not one, but two majority-black districts in Bossier." J.A. 38. Even a cursory glance at the maps reveals that both black majority districts are far less compact, and more unwieldy, than the Georgia district struck down in *Miller*. *Cf. Miller*, 115 S. Ct. at 2477, 2495.

The only "flaw" appellants seek to identify in the Police Jury plan is that it did not sufficiently provide for "incumbency protection" because it "paired" incumbents in two districts.[34] While the Board may have initially perceived this as a "flaw" in the Police Jury plan, it is certainly not a "flaw" *in relative terms*. As appellants elsewhere argue when it fits their purposes, and as is evident from the NAACP plan's dramatic departure from the 1980's district configurations, that plan would have disrupted incumbents' desired and existing districts more substantially than the Police Jury plan. U.S. Br. 26 n.15. Thus, even if the desire of "representatives [to] select [their] people" should be elevated to the status of a beneficial redistricting principle serving the public interest, the NAACP's plan is worse in this regard as well. *Vera*, 116 S. Ct. at 1954. Thus, contrary to appellants' argument, if incumbency was a "factor usually considered important by the decisionmaker [it did] not strongly favor a decision contrary to the one reached . . . " and thus provides no basis for an "inference of discrimination." U.S. Br. 27 (quoting *Arlington Heights*, 429 U.S. at 267 & n.17). To be sure, some Board members probably did initially resist the Police Jury plan because of the "pairs" and desired a plan that better "protected" everyone. This

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[34] There is no evidence that the appellants newly-discovered "a school building in every district" rule was ever a redistricting principle in the Parish, or that the NAACP plan adhered to it at all. U.S. Br. at 26-27.

potential defect, from a self-interested perspective, of the Police Jury plan, however, was outweighed by the fact that, among any of the plans arguably consistent with state law and districting principles, the Police Jury plan *alone* "guaranteed preclearance" in the face of the NAACP's opposition. App. 28a. Such accommodation of competing interests hardly suggests a discriminatory purpose, but simply reflects the normal selection process among imperfect alternatives that typifies all redistricting decisions.[35]

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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[35] The sum total of appellants' purpose case thus reduces to the complaint that the district court failed to sufficiently discount the Board's appointment of a black member for the only vacancy available and did not put the most nefarious possible spin on certain hearsay statements that Board members allegedly conveyed to the appellant-intervenor and other civil rights advocates in the community. App. 30a-31a. This quibbling over the import (or existence) of, at worst, ambiguous acts and statements is of no consequence because "such questions of credibility are matters for the District Court" and this Court will not "second-guess the district court's assessment of the witness's testimony." *Vera*, 116 S. Ct. at 1957. In any event, as even the dissenting opinion conceded, the Board members' alleged "statements standing alone would certainly be insufficient to show discriminatory purpose." App. 53a.